TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 97

ANSEL HIGGINS, PETITIONER,

vs.

CARR BROTHERS COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

PETITION FOR CERTIORARI FILED MAY 20, 1942.

CERTIORARI GRANTED JUNE 8, 1942.

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[fol. 1]

IN SUPERIOR COURT OF CUMBERLAND COUNTY

STATE OF MAINE. APRIL TERM, A. D. 1941

No. 8194

ANSEL HIGGINS

v.

CARR BROTHERS COMPANY

OPINION—May 5, 1941

The plaintiff sues to recover unpaid wages and overtime compensation alleged to be due him by reason of the provisions of the Fair Labor Standard- Act of 1988, 52 S. D. A. T. 1060.

On October 24, 1938 when the said Act went into effect the Plaintiff was an employee of the Defendant and this relationship continued until July 24, 1940.

The Defendant is engaged in the sale and distribution to the retail trade of fruits, vegetables and groceries. It obtains its merchandise partly from local sources and partly from without the state. It buys for resale and general distribution. The merchandise is brought to the store of the defendant and from there sold and distributed to retail dealers. Some of the merchandise is processed for the retail trade, the remainder is sold in the same condition in which it is received in the store.

The Plaintiff testified that from October 24th, 1938 the date on which the Act became effective, to April 1, 1939, he was "night watchman and shipper". He described his duties as follows, "Well I had all the orders to put up and I had to take care of all the customers that came in, put [fol. 2] up the freight and then get it ready to ship". From April 1, 1939 until he left the employ of the defendant, he testified he drove a delivery truck.

On October 24th, 1938 and for a period thereafter, the defendant was selling and delivering a part of its merchandise to customers in New Hampshire. The witnesses for the plaintiff and defendant differ as to the length of this period. The driver of the truck, making the New Hampshire deliveries testified that he made such deliveries until about the First of January 1939. I find as a fact that

such deliveries were made for a period of ten weeks from October 24, 1938.

During such time I find that the defendant was engaged in the sale and distribution of merchandise in such manner and that it was engaged in Inter State commerce and the plaintiff was an employee of the defendant, doing work that was a part of such sales and distribution and that the provisions of the Act apply to the relations of the plaintiff and defendant as employer and employee during such period.

The plaintiff testified during this period he was working from 8 a. m. to 8 p. m. with one hour out for lunch and I find that such was the fact. I find that during this period his unpaid minimum wage and overtime compensation amounts to $31.70. He is entitled under the provisions of the Act to an equal sum as liquidated damages, a total of $63.40.

Do the provisions of the Act apply to the employment of the defendant subsequent to the time when sales and deliveries in New Hampshire were discontinued? In Schechter vs. United States, 295 U. S. 495, the defendants were indicted for violation of a code established under the pro- [fol. 3] visions of the National Recovery Act. The code in question applied to the sale and distribution of poultry. In passing upon whether such sale and distribution was part of Inter State Commerce, Chief Justice Hughes in his opinion first described the business carried on by the defendants as follows: "Defendants ordinarily purchase their live poultry from commission men at the West Washington market in New York City or at the railroad terminals serving the city. But occasionally they purchase from commission men in Philadelphia. They buy the poultry for slaughter and resale. After the poultry is trucked to their slaughterhouse markets in Brooklyn, it is there sold usually within twenty-four hours to retail poultry dealers and butchers who sell directly to consumers. The poultry purchased from defendant is immediately slaughtered prior to delivery by schochtim in defendants' employ". He then said, "Were these transactions 'in' interstate commerce? Much is made of the fact that almost all the poultry coming to New York is sent there from other states. But the code provisions, as here applied, do not concern the transportation of the poultry from other States to New York, or the transactions of the commission men or others to

whom it is consigned, or the sales made by such consignees to defendants. When defendants had made their purchases, whether at West Washington Market in New York City or at the railroads' terminals serving the city, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers, [fol. 4] who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce.——

"The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a 'current' or 'flow' of interstate commerce and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry herein questioned is concerned, the flow in interstate commerce has ceased. The poultry had come to a permanent rest within the State. It was not held, used or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other States.

Hence decisions which deal with a stream of interstate commerce—where goods come to rest within a State temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here."——

The Schecter case and the present case arise under different Statutes. It is necessary however to determine in each case whether the method of doing business constitutes Inter State Commerce. In the Schecter case the Court of last resort interpreted a method of doing business definitely [fol. 5] outlined by the Court as not constituting Inter State Commerce. The Court did not qualify its decision on this point as applying solely or particularly to matters arising under the Statute then under consideration. By its language it indicated that its decision was founded

upon a general principle applicable to any case arising, in which it is necessary to determine whether a method of doing business constitutes Inter State Commerce. The method of doing business in that case and the present case are essentially the same. The commodities dealt in by the respective defendants in the two cases are different, but in each case the commodities were obtained partly from local sources and partly from sources without the state. The commodities were deposited in the principal place of business of the respective defendants and from there sold and delivered. I find that the plaintiff was employed in the sale and delivery of the defendant's merchandise from its store and that the business did not constitute Inter State Commerce.

As to the plaintiff's contention that the provisions of the Act apply because the defendant competes with other dealers who are engaged in interstate commerce, I believe that that part of the opinion applied in which the Chief Justice said, "—But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of State power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic [fol. 6] concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to Federal control".

He further said "The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their hours and wages have no direct relation to interstate commerce. The question of how many hours these employees should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle commodities brought into a State and there dealt in as a part of its internal commerce".

I find that provisions of the Act do not apply after the ten week period in which deliveries were made in New Hampshire. I find judgment should be for the plaintiff in the sum of $63.40 as his unpaid wage and overtime compen-

sation and liquidated damages and in addition thereto an Attorney's fee of $100.00 making a total of $163.40.

May 5, 1941.

Arthur Chapman, Justice Superior Court.

[fol. 7] In Supreme Judicial Court of Maine

Ansel Higgins

v.

Carr Brothers Company

Opinion—February 25, 1942

Sturgis, C. J.:

In this proceeding the plaintiff, Ansel Higgins, sues his employer, Carr Brothers Company for unpaid wages and overtime compensation alleged to be due him with liquidated damages for the period from October 24, 1938, to July 24, 1940, under the Fair Labor Standards Act of 1938, 52 Stat. 1060, U. S. C. A. Tit. 29, c. 8, #201, et seq. The plea was the general issue with a brief statement denying that the employer and employee were engaged in interstate commerce at the time embraced in the declaration and that the Fair Labor Standards Act had been violated. By consent of the parties the case was heard by the court with jury waived and with the right to except as to matters of law reserved. The plaintiff presents his exceptions to the decision filed.

The Fair Labor Standards Act of 1938, approved June 25, 1938, with exceptions not here of concern, fixes the minimum hourly wage and the maximum hours of the workweek of all employees who are engaged in commerce or in the production of goods for commerce. As defined "commerce" means interstate commerce. Section 3(b).

The Act provides in Section 6(a), effective October 24, 1938, that such employees shall be paid,

"(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour * * *."

And in Section 7(a), also effective on October 24, 1938, that no employer shall employ any such employee,

"(1) for a workweek longer than forty four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

"Unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Under Section 16(b) any employer who violates Sections 6 or 7 of the Act is "liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." In addition to any judgment awarded, the plaintiff or plaintiffs are entitled to the allowance of a reasonable attorney's fee and costs of the action.

(1) Carr Brothers Company is a local corporation conducting a wholesale fruit, grocery and produce business in Portland. It buys its merchandise from local producers and from dealers in other states, has it delivered by truck and rail, unloaded into its store and warehouse and from there sells and distributes it to the retail trade. While some of [fol. 8] the produce and fruit is processed, much of it is sold in the condition in which it is received. The corporation owns all of its merchandise and makes its own deliveries. It makes no sales on commission nor on order with shipments direct from the dealer or producer to the retail purchaser. When the wage and hour provision of the Fair Labor Standards Act went into effect the corporation was selling and delivering its merchandise not only to the local trade in Maine but also to retailers in various cities and towns in New Hampshire and the record indicates that a somewhat substantial part of what it bought in other states was intentionally destined for final transportation into New Hampshire after a temporary deposit or rest in its store or warehouse in Portland. At the end of ten weeks, however, this out of state trade was discontinued and thereafter all sales and deliveries were solely to retailers in Maine.

The plaintiff, Ansel Higgins, was at first employed by Carr Brothers Company as night shipper, serving customers, putting up all orders and loading trucks including those used for out of state deliveries. He worked sixty-six hours a week for a wage of $16 in this service for the ten weeks in which trade in New Hampshire continued. The court below found and ruled that for this period the employee was entitled to the benefits of Sections 6(a), 7(a) and 16(b) of the Act and the defendant employer was liable to him for unpaid minimum wages and overtime compensation computed to be $31.70, together with liquidated damages of equal amount, a $100 counsel fee and altogether $163.40. Standing alone this decision is not attacked mathematically or otherwise. It seems to have been fully warranted. The merchandise which Carr Brothers Company purchased in other states intended to be shipped into Maine, here rest temporarily only, and later go forward in transportation to New Hampshire remained in the "current" of interstate commerce, until it reached its ultimate destination. The continuity of the movement of the goods was never broken in Maine and did not then cease. Swift & Co. v. United States, 196 U. S. 375, 25 S. Ct. 276; Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397; Board of Trade of City of Chicago v. Olsen, 262 U. S. 1, 35, 43 S. Ct. 470; Binderup v. Pathé Exchange, 263 U. S. 291, 44 S. Ct. 96. It is clear on the record, we think, that the plaintiff employee, for the period that he was actively and regularly employed in putting up orders and loading trucks with merchandise for New Hampshire delivery, was engaged in commerce as defined by Section 3(b) of the Fair Labor Standards Act and entitled to receive the benefits of the applicable provisions of the law.

The employee directs his exception to the denial, in the trial court, of his claim for unpaid minimum wages and overtime compensation alleged to be due him under Section 6(a) and 7(a) of the Fair Labor Standards Act during his further employment by the defendant corporation *from early in January, 1939, until July 24, 1940, when he quit work.* His employer had then discontinued its interstate sales and deliveries in New Hampshire and was carrying on a strictly local wholesale business. For the first three months of this period the employee continued to work as night shipper, putting up orders and loading trucks, but all for local delivery to retail dealers in Maine. During his subsequent employment he drove a light truck distributing

merchandise to the same local trade. The employer was still buying in out of state markets but when the shipments were unloaded into its store and warehouse in Portland the merchandise was owned and held by it there solely for local sales and deliveries to domestic retail dealers for direct resale to consumers. With exceptions of minor importance and not here controlling, this status continued without interruption. The merchandise "was not held, used or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other states." Its interstate movement had ended. Subsequent local sales and deliveries were purely intrastate activities and in these this employee was solely engaged. Schechter Poultry Corp. v. United States, 295 U. S. 495, 543, [fol. 9] 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947; Atlantic Coast Line R. Co. v. Standard Oil Co., 275 U. S. 257, 267, 48 S. Ct. 107, 72 L. Ed. 270; Public Utilities Commission v. Landon, 249 U. S. 236, 245, 39 S. Ct. 268, 63 L. Ed. 577.

(2, 3) The employee, through counsel, argues, however, that, even though he was engaged solely in intrastate commerce in the latter periods of his employment by the defendant corporation, his hours and wages so adversely affected interstate commerce that they became subject to federal control under the Fair Labor Standards Act, and for violation thereof, recovery may be had as there provided. This contention did not prevail in the trial court and cannot here. It is, of course, a familiar principle that Congress may not only regulate transactions which are a part of interstate commerce but may also protect that commerce from injuries which result from the conduct of those engaged in intrastate operations. But it is elementary that in order to subject intrastate transactions to federal control they must directly affect interstate commerce and if their effect is merely indirect the transactions remain within the "domain of state power." It is well settled now that the hours and wages of persons employed in purely intrastate commerce have no direct relation to interstate commerce and an attempt to fix such hours and wages by regulation is not a valid exercise of federal power. Schechter Poultry Corp. v. United States, supra. See National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 29, 57 S. Ct. 615; Carter v. Carter Coal Co., 298 U. S. 238, 309, 56 S. Ct. 855; United States v. Butler, 297 U. S. 1, 75, 56 S. Ct. 312.

In Schechter Poultry Corp. v. United States, supra, the question of the right of federal control over the wages and hours of the defendant's employees under the Live Poultry Code, 48 Stat. 195, 196, 15 U. S. C. A. #703, was presented for determination. On a finding that the employees were handling poultry after it was received in interstate commerce into the defendant's slaughter house markets solely for sale to local retailers for resale, it was held that the employees were engaged in purely intrastate commerce, their hours and wages had no direct relation to interstate commerce, and the attempt through the Code to fix the hours and wages was not a valid exercise of federal power. In delivering the opinion of the Court, Mr. Chief Justice Hughes said:

"In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. * * * where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control. * * *

"It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power of the federal government in its control over the expanded activities of interstate commerce and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, [fol. 10] between commerce 'among the several States' and the internal concerns of a state."

The *decision in the Schechter case and the doctrines there enunciated are still in force and effect despite unauthoritative advices to the contrary.* On the point under consideration the factual situations there and here are entirely parallel and, despite the differences in the statutes under which government control of hours and wages in an intrastate business is attempted or invoked, the principles involved are the same. We find no valid ground upon which the cases can be distinguished. The decision of the Supreme Court of the United States upon the question of the interpretation and application of the commerce clause of the Federal Constitution, U. S. Const., Art. 1, #8, cl. 3, is conclusive and binding upon this court. We concur with the learned Justice presiding below that it cannot be held in this action that the hours and wages of the plaintiff employee while he was working in the defendant's purely intrastate business so affected interstate commerce that they are subject to federal control under the Fair Labor Standards Act.

No error in the rulings below being made to appear, the exception reserved must be overruled.

Exception overruled.

I certify that the foregoing is a true copy of the opinion in the above entitled case.

Gail Laughlin, Reporter of Decisions.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 11] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—June 8, 1942

On consideration of the motion for leave to proceed further herein *in forma pauperis*,

It is ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 12] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 8, 1942

The petition herein for a writ of certiorari to the Supreme Judicial Court of the State of Maine is granted. In view of the Act of August 24, 1937 (28 U. S. C. sec. 401), the Court hereby certifies to the Attorney General of the United States that the constitutionality of the Fair Labor Standards Act is drawn in question in this case.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1087)